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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/758,854	01/16/2004	Sreenivas Addagatla	042933/271712	6954

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EXAMINER	
WHIPPLE, BRIAN P	

ART UNIT	PAPER NUMBER
2452	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	**Application No.** 10/758,854	**Applicant(s)** ADDAGATLA ET AL.	
	Examiner BRIAN P. WHIPPLE	**Art Unit** 2452	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 01 September 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☒ The period for reply expires *3* months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: *1,4-7,12,16-22,26 and 27*.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

/Dohm Chankong/
Primary Examiner, Art Unit 2452

Continuation of 11. does NOT place the application in condition for allowance because:

It is true the response to arguments by the Examiner in the last action improperly characterized the phrase "the least one of" as "the at least one of." However, the claims are still read on by the same ground(s) of rejection.

MPEP 706.07(e) states that the finality of an action is normally only withdrawn in order to allow the claims or occasionally to apply a new reference and a new ground(s) of rejection. The section also states that normally the previous ground(s) of rejection would be withdrawn in the situation where a new ground(s) of rejection is applied. Since the claims are still read on by the same ground(s) of rejection, neither scenario for withdrawing finality is present. Therefore, the finality is maintained with response to the Applicant's arguments following.

Applicant argues the three data transfer rates of Hsu are all of a single NIC. This is incorrect as Hsu shows a data transfer rate for a network linking interface device (Col. 3, ln. 43-50; Col. 4, ln. 56-59, “the network interface card… acquires the capability for the physical layer of the remote-end network interface card”). In other words, there is a local network interface card that is capable of up to 1 Gbps. The remote network interface possesses its own capability in regards to network speeds (Col. 4, ln. 59-63, “if the remote-end network interface card supports linking modes of 10 Mbps, 100 Mbps and 1 Gbps, both ends can link to each other at 1 Gbps after negotiation). This capability is indicative of a second data transfer rate. Hsu acknowledges that the remote end being capable of 1 Gbps is not always the case as negotiation must occur and then only “if” the device is capable of 1 Gbps is that speed implemented between the local and remote network interface cards. There are network interface cards that only support 10 Mbps and 100 Mbps.
The network itself has a third data transfer rate (Fig. 6, first graph; Col. 4, ln. 59-66, “average load”). The network itself has its own variable data transfer rate that is related to the current load under which the network is placed.
Additionally, it is worth noting that the claim does not preclude the possibility of the three data transfer rates being equal to each other. For example, the first network interface card could store the highest speed it is capable, the second network interface card could do the same, and the network as well. In this scenario, it is possible that all three values could be equal to each other, or in other words X=Y=Z, but all three are independently stored values determined by the respective devices. In other words, the two network interface cards and the network itself may all independently indicate they are capable of 1 Gbps.

Applicant argues a throttle value “equal to the least one of the first, second, and third data transfer rates” is not disclosed by Hsu. The Examiner respectfully disagrees. As, Hsu, discloses a scenario in which the network load is monitored in order to throttle the data to the lowest network rate of 10 Mbps at appropriate times (Col. 4, ln. 63 – Col. 5, ln. 11, this section generally discloses the throttling process; Col. 6, ln. 17-20, “the link speed is further lowered to 10 Mbps). In this situation, the transfer rate has been throttled to a speed that is equal to the lowest speed of the network interface cards (i.e., 10 Mbps).
Additionally, as discussed above, there are scenarios in which the three data transfer rates may all be taken to be equal to each other (the X=Y=Z situation). For example, all three may be the highest possible of 1 Gbps. Therefore, as soon as the throttling is introduced, it is necessarily less than or equal to these rates. For example, if all three are operating at 1 Gbps, then in a situation such as described (Col. 4, ln. 63 – Col. 5, ln. 11) where the threshold for throttling is 50 Mbps, then this throttle value is clearly less where the three data transfer rates are equal to each other and equal to 1 Gbps.

Finally, Applicant argues that the average load of the network may not be equated to the network (or third) data transfer rate. The Examiner respectfully disagrees. The Applicant argues that the “average load relates to a measure of the amount of data being sent across the network not the data transfer rate of the network.” However, the average load is measured in terms of Mbps (Fig. 6, first graph; Col. 4, ln. 59-66, “average load”). The number of megabits per second being sent at any given time is a data transfer rate (as the measurement is the rate of megabits transmitted per second).
Additionally, as discussed in the two preceding sections, the three data transfer rates could all be equal to each other at a value such as 1 Gbps. In this situation, the data transfer rate of the network would be a set rate as opposed to a current load on the network (as appears to be argued by the Applicant, but not required by the claim itself).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to BRIAN P. WHIPPLE whose telephone number is (571)270-1244. The examiner can normally be reached on Mon-Fri (11:30 AM to 6:00 PM EST).
If attempts to reach the examiner by telephone are unsuccessful, the examiner’s supervisor, John Follansbee can be reached on (571) 272-3964. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.
Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Brian P. Whipple
/B. P. W./
Examiner, Art Unit 2452
9/14/09